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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO DIAZ,

Defendant and Appellant.

B213469

(Los Angeles County  
Super. Ct. No. LA055149)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Modified and affirmed with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Viet H. Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Gerardo Diaz appeals from the judgment entered following a jury trial in which he was convicted of carjacking and first degree burglary. Defendant contends the trial court erred by instructing upon flight and in awarding presentence custody credits. We agree with respect to credits but otherwise affirm.

### **BACKGROUND**

About 1:00 a.m. on March 9, 2007, Sean Lawrence parked his car in the community garage beneath his condominium building, which was located in Los Angeles County. Before the automatic garage gate could close completely, Lawrence saw that a white Toyota had blocked the gate from closing. When Lawrence got out of his car, he saw defendant standing near his rear tire. Defendant demanded Lawrence's cash. When Lawrence balked, defendant displayed the barrel of a gun from beneath his sweatshirt. Lawrence handed over his cash. Defendant demanded and received Lawrence's mobile phone, perused the contents of the trunk, and asked what was in the backseat. Defendant then demanded the keys to Lawrence's car. When Lawrence hesitated, defendant showed him the entire gun. Lawrence handed over his keys. When defendant tried to unlock Lawrence's car, the car alarm sounded. At defendant's command, Lawrence showed him how to silence the alarm. Defendant got into the car for "a minute or two," then got out, returned the keys to Lawrence, "ran out, jumped in the white car and took off."

About two hours later, Bertrand Levesque returned to his car after taking a friend home, also in Los Angeles County. Before Levesque could drive away, defendant appeared at the car door, "flashing" a gun. A white Toyota moved in front of Levesque's car to block his exit. Defendant opened the car door, pointed the gun at Levesque and threatened to shoot if Levesque moved. Defendant then ordered Levesque to get out of the car and repeatedly asked him if he had "anything on" him. Levesque gave defendant his money as defendant again threatened to shoot him. Defendant got into the driver's seat of Levesque's car, ordered Levesque to open the passenger door, again asked if Levesque had anything else, and drove off in the car. The white Toyota drove away just

before defendant did. Levesque's car was a 2005 Nissan Sentra. He reported the crime to the police immediately.

About 9:30 p.m. on March 10, 2007, Los Angeles Police Department Officer Hector Gutierrez and his partner were patrolling in a marked police car when Gutierrez noticed two people in a gray Nissan Sentra who appeared to be wearing gang attire and watching people on the street. Gutierrez "ran" the license plate and discovered that the Sentra had been reported stolen with a notation of "armed and dangerous vehicle." Gutierrez requested backup and followed the Sentra. When Gutierrez turned on the police car's flashing lights and siren, it appeared the Sentra was pulling over, but it suddenly sped away. Gutierrez chased the Sentra until he lost sight of it. Officer Cynthia Torres was in another police car pursuing the Sentra. The Sentra stopped in a Walmart parking lot and the driver ran inside the store. Defendant remained seated in the Sentra until Torres ordered him to get out. Police found .22-caliber bullets in defendant's pocket. They found a loaded .22-caliber revolver in front of a home along the route of the police pursuit.

Detective Alejandro Garcia testified that after he told defendant that Levesque had selected defendant's photograph from a six-pack of photographs, defendant admitted committing the carjacking. With respect to his capture, defendant said he asked a juvenile friend to drive "because he didn't want to get in trouble. And if the police tried to stop them, he told him that they were going to try to get away . . . ." Defendant also admitted throwing the gun from the car window.

Defendant exercised his right of self-representation and presented a defense of mistaken identity. Lawrence testified on cross-examination that he described the suspect to the police as a Black male about 30 years old. Lawrence further testified that defendant was not the only "Black man" in the array of photographs. Defendant told the jury during closing argument that he was 18 when the crimes were committed. Garcia testified on cross-examination that he did not include any Black males in the six-pack of photographs he showed to Lawrence because defendant did not appear Black to him.

Although Levesque testified on direct that the carjacker had the hood of his sweatshirt pulled up over his head, on cross-examination Levesque testified that the carjacker had a shaved head. Defendant then introduced his booking photograph from the next day, which depicted him with hair. Neither Lawrence nor Levesque saw tattoos on their assailant's hands, and defendant told the jury during closing argument that he had had tattoos on his knuckles since he was 15.

The jury convicted defendant of carjacking and first degree burglary and found that defendant personally used a gun in the commission of each offense. The court sentenced defendant to prison for 23 years 8 months.

## **DISCUSSION**

### **1. Flight instruction**

The trial court included CALJIC No. 2.52 in the jury instructions, apparently without objection by defendant. As given, the instruction stated, "The flight of a person immediately after the commission of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Defendant contends the instruction improperly permitted the jury to infer consciousness of guilt because his flight occurred 43 hours after the commission of the carjacking.

A flight instruction is required where the evidence shows that defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. (Pen. Code, § 1127c; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) The court should not instruct upon flight where the evidence shows only that the defendant was arrested somewhere other than the crime scene some time after the crime. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 877.) The California Supreme Court has repeatedly upheld the use of CALJIC No. 2.52 against a variety of challenges, including arguments that it creates an unconstitutional permissive inference and reduces the

prosecution's burden of proof. (*People v. Mendoza* (2000) 24 Cal.4th 130, 179–181; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223–1224.)

“To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) There is no “defined temporal period within which the flight must be commenced.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1182 (*Carter*) [flight instruction proper where evidence showed defendant left state “in the days immediately following the charged offenses”].) The police pursuit that started when Officer Gutierrez attempted to pull over Levesque's stolen Sentra thus potentially constituted flight and warranted giving CALJIC No. 2.52.

“The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it.” (*Carter, supra*, 36 Cal.4th at pp. 1182–1183; *People v. Abilez* (2007) 41 Cal.4th 472, 522, citing *Carter*, at p. 1182.) Another instruction (CALJIC No. 17.31) directed the jury to disregard any instruction applying to facts that it determined did not exist. Accordingly, if the jury did not find that defendant's participation in the police pursuit constituted flight, it would simply disregard CALJIC No. 2.52 and would not infer consciousness of guilt. But if the jury found flight, the instruction provided defendant some protection by informing the jury it could not infer his guilt from flight alone.

Defendant further challenges the instruction on the ground that he was not driving the car when Officer Gutierrez attempted to stop it, and the instruction improperly permitted the jury to infer his consciousness of guilt from the driver's conduct. But defendant's admission that he told the driver that they were going to attempt to get away if the police tried to stop them shows that defendant was at least partially responsible for the attempt to outrun the police. He was not simply a hapless passenger who wanted the stolen car to pull over when Gutierrez activated the lights and siren on the police car. The attempt to evade the police car, along with defendant's admitted acts of recruiting a friend

to drive “because he didn’t want to get in trouble” and disposing of the gun used in the crimes during the police pursuit strongly evinced a consciousness of guilt.

**2. Presentence custody credits**

Defendant contends, and the Attorney General agrees, that defendant was entitled to one additional day of actual presentence custody credit. We modify the credit award accordingly and direct the trial court to issue an amended abstract of judgment.

**DISPOSITION**

The judgment is affirmed. Defendant’s presentence credits are modified to be 670 days of actual custody credit and 100 days of conduct credit, for a total of 770 days. The trial court is directed to amend the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.